

Responding to a subpoena

Legal information for community organisations

This fact sheet covers:

- ▶ terms used
 - ▶ what is a subpoena?
 - ▶ subpoena to produce documents
 - ▶ subpoena to attend
 - ▶ contacting the court or tribunal
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Note

This fact sheet provides general information about responding to a subpoena. This information is intended as a guide only and is not legal advice. If you or your organisation has a specific legal issue, you should seek legal advice before deciding what to do.

Please refer to [the full disclaimer](#) that applies to this fact sheet.

There are many different courts and tribunals in Australia and each has its own different rules for dealing with subpoenas. This fact sheet is therefore a general guide only.

Terms used

Some of the terminology used in this fact sheet may be unfamiliar, so we have explained these terms below.

Court or tribunal rules	Each court or tribunal has its own set of rules regulating and prescribing the practice and procedure to be followed in proceedings in that court or tribunal. They can usually be found online at the relevant court or tribunal website. If you are having trouble locating these rules or regulations you can contact the relevant court or tribunal. Alternatively you can locate all Australian rules or regulations (and legislation) at Austlii .
Court order	A command or direction issued by a court or tribunal requiring a person, business, organisation or corporation to do or not do something.
Issuer of the subpoena	This is the party to the legal proceeding that filed the subpoena with the court and is seeking to compel the subpoena recipient to attend the court or tribunal to give



evidence, produce documents, or both. The contact details for the issuer will appear on the subpoena document – often this will be the lawyer for the party. Where there is a lawyer listed, you should speak to them not the party themselves.

Party or parties	The people, businesses, organisations, corporations or other legal entities directly involved in the court proceedings. Generally, the name of the parties will be used to give a title to the court proceedings (sometimes referred to as the 'Title of proceedings') which you can generally find at the front of the subpoena document. Being issued a subpoena does not make you a party to the proceedings.
Proceeding or proceedings	A word used to describe an action taken in a court or tribunal.
Produce or produced	Another word for provide or supply.
Subpoena recipient	A person, business, organisation, corporation or other legal entity served with a subpoena who is required to attend the court or tribunal to give evidence, produce documents, or both.
Service or served	Service is a term used to describe the various methods of delivering certain legal documents to a person, business organisation, corporation or other legal entity. When service has been effected, that person has been 'served'.



What is a subpoena?

A subpoena is an order issued by a court or tribunal in response to a request by a party to a civil or criminal proceeding requiring another person to attend that court or tribunal to give evidence, or to produce a document or thing within that other person's possession, or both.

The other person is not a party to the proceeding.

Parties often issue subpoenas to gather evidence for their case. Another way to think of this – an information gathering activity.

A subpoena can be issued on third parties or on a party to a proceeding. Being issued a subpoena does not make you a party to the proceedings.

A subpoena is a court order that requires the recipient to:

- attend the court or tribunal as a witness – a 'subpoena to attend'
- produce certain documents to the court or tribunal – a 'subpoena to produce'
- attend court as a witness – a 'subpoena to attend'
- both – a 'subpoena to produce and to attend'



Note

A 'subpoena' may be known as a different name depending on the court or tribunal it is issued out of such as a 'witness summons' or a 'third party notice for production'.

In this fact sheet, we use the term 'subpoena' as it is the most common name, but these principles still apply to other documents with different names that operate in the same manner as a subpoena.



Caution

Failure to comply with a subpoena without a lawful excuse is a contempt of court and the person can be punished, including by being fined or (in rare cases) imprisoned.



Tip

A subpoena is different from a search warrant. A search warrant is also a court order, but it lawfully permits authorities to enter and search your property or premises.

Is the subpoena valid?

Check the following subpoena details:

Does the subpoena have a 'filed' stamp showing the date it was filed?

A filed stamp or cover page is proof that the document was issued by the court or tribunal. If there is any doubt, contact the court or tribunal and ask them to confirm that the subpoena was filed and issued.

If they have no record of the subpoena, don't comply with it and contact the party that issued the subpoena to let them know that you will not be complying with the subpoena as the court or tribunal has no record of it. It's preferable that this contact is made in writing (for example, by email) so you have a record of the contact, if needed at a later date.

Did you receive the subpoena before the 'last date for service'?

The last date for service will be stated in the subpoena document.

If you didn't receive the subpoena before this date, you have the option of asking the other party to obtain an extension of the return date from the court. Alternatively, if there is no issue with you complying by the return date, you should do so.

Was the subpoena served in accordance with the court or tribunal rules?

Each court or tribunal has its own set of rules for service, for example rules on how the subpoena is to be delivered to the person (such as – being handed to the person personally, left at the premises, or posted).

If there is an issue with the service of the subpoena, you can raise this with the issuer of the subpoena. Alternatively if there is no issue with you complying by the return date, you should do so.

Were you provided with 'conduct money' (payment to cover your costs of complying with the subpoena)?

The standard is usually to cover 'reasonable expenses' and is generally between \$30 and \$50, but this varies.

In some circumstances a subpoena recipient is not excused from complying just because conduct money has not paid, so if there is any issue with the conduct money, including if it is not provided, you should raise this with the issuer of the subpoena before the return date.

If any of these points are an issue, seek legal advice.



Subpoena to produce documents

When do I have to comply with the subpoena?

The date that the documents need to be produced is referred to in the subpoena as a 'return date'. The documents need to be produced to the court or tribunal for its records and not to the party that issued the subpoena. The relevant court or tribunal address will be in the subpoena.

If you need more time to produce the documents, contact the issuer of the subpoena so that a joint request can be made to the court or tribunal for a new return date. Alternatively you or a lawyer can appear at the court or tribunal on the return date and ask for a new return date. You may need to provide an explanation.

If you have missed the return date or a deadline you can contact the issuer of the subpoena to obtain a new return date in the same way.

The subpoena schedule

A subpoena to produce will have a 'schedule' listing the documents to produce. You only need to produce documents that are in your (or your organisation's) possession or control.

Before producing the documents you should consider whether you need to inform anyone that you are disclosing the documents. For example, you may have a contract with someone which states that you will obtain their consent before producing documents or you may have privacy obligations under the law.

You are entitled to consult with people in your organisation about the subpoena or those whose rights or privacy may be affected by the production of the documents. You can object to providing certain information for confidentiality reasons if the information is not relevant to the subpoena.

Most legal proceedings are open to the public so unless the proceedings are subject to a non-publication order or are closed, you are permitted to discuss the subpoena with others.

If you are able to produce the requested documents by the return date at a reasonable expense and have no objections then you should do so.

You only need to produce documents that are within your possession or control. If you have conducted all reasonable searches and have not located any documents in your possession or control falling within the subpoena schedule, you should still produce a copy of the subpoena and complete any subpoena declarations. You can include a covering letter to the court stating that you do not have any of the relevant documents in your possession or control.

Objections to producing documents

Valid objections to producing documents include:

- producing all the requested documents would be very onerous and time consuming for you – if that is the case, you can apply to the court to have the subpoena set aside or negotiate an amended schedule, and
- grounds of privilege, public interest immunity or confidentiality

Claims for 'privilege' can potentially be made over documents containing communications with lawyers or content relating to past or present legal proceedings. Speak with the lawyers referred to in the communications. If you think there may be public interest or confidentiality issues you may also have grounds for objection.

These issues can involve complex technical legal issues so consider seeking legal advice if you think they may be relevant. See below for information on what to do with documents that you object to producing.



Producing the documents

If you have prepared the relevant documents to be produced you can:

- attend the court or tribunal on the return date and hand over the physical documents to the court, or
- send the documents to the court or tribunal within the timeframe indicated on the subpoena

Place them in an envelope labelled with the proceedings number, party details, subpoena recipient details and words such as 'Documents produced under subpoena by [INSERT]'. Include your contact details on the envelope.

Some courts or tribunals offer the option for documents to be produced electronically. Contact the court or tribunal for further information.

If you are posting the documents to the court or tribunal, send them by registered post, or another method providing tracking information and signature on delivery. This cost could form part of any costs you seek for compliance (see below).

If there are documents that you object to producing such as privileged documents, they still need to be produced to the court but in a separate envelope to any documents you do not object to producing.

So that it's clear that there is an objection to the production of those documents, the envelope should be marked with:

- the proceedings number
- party details
- subpoena recipient details
- that the documents are privileged, by writing something such as 'PRIVILEGED AND CONFIDENTIAL', and
- your contact details

Also prepare a list of the documents that you object to producing and the reasons why for the parties to the proceeding. The parties are entitled to know what the documents are generally and the basis of your objections (for example, grounds of privilege), and they may ask you for further information. They may consent to or oppose your objections.

Check if the subpoena is asking for original documents and if not, keep the originals and produce copies. However – if you send original documents, keep a copy. If you want the documents to be returned to you after the proceedings are concluded, most subpoenas have an option for you to ask for this to happen.

Make sure you complete any declarations contained in the subpoena.

Costs of compliance

In some circumstances a subpoena recipient may have their reasonable costs of compliance paid in addition to the conduct money. Keep a copy of any expenses incurred in attending court for reimbursement. You can raise this with the issuer of the subpoena and should do so as early as possible.

Most courts and tribunals also give you the option of making an application to the court for your costs to be reimbursed.



Subpoena to attend

When do I have to comply with the subpoena?

For this kind of subpoena the 'return date' is when the person named in the subpoena is required to attend the court or tribunal to give evidence as a witness under oath or affirmation (a legally binding promise to tell the truth). The witness will be required to answer questions asked by the parties' lawyers about issues relevant to the proceeding.

On average a witness will not be required for longer than a day or two, but it can take longer depending on the case. The witness will need to be available to attend court for the duration of the hearing or until they are excused by the court.

You can contact the party that requested the subpoena about which days you will need to attend.

What should I do when attending court?

A witness attending a hearing should ensure that they are punctual and dress professionally. When giving evidence, make sure you listen carefully to the questions you are asked. If you don't understand a question or a word, say so. Evidence given in a court or tribunal is recorded and provided to the parties. You can be subject to a penalty if you lie under oath or affirmation. The lawyer for the party that requested the subpoena can provide you with any further information you need.

What if I can't attend court on the date specified in the subpoena?

If there are circumstances preventing your attendance (for example, if you are going to be overseas or you are unwell), contact the party that requested the subpoena as a first step. You can contact the court or tribunal for further information but you should not ignore the subpoena.

Costs of compliance

The witness may be entitled to have their reasonable costs of compliance paid (for example transport and accommodation expenses) in addition to the conduct money. Keep a copy of any expenses incurred in attending court for reimbursement. Raise this with the issuer of the subpoena as early as possible.



Contacting the court or tribunal

Contact details for courts and tribunals are provided in the table below.

Jurisdiction	Court or tribunal
Federal	High Court of Australia Federal Court of Australia Federal Circuit and Family Court of Australia Administrative Appeals Tribunal (AAT)
New South Wales	Children's Court of New South Wales District Court of New South Wales Drug Court of New South Wales Dust Diseases Tribunal Independent Commission Against Corruption NSW Land and Environment Court of New South Wales Local Court of New South Wales New South Wales Coroners Court NSW Civil and Administrative Tribunal (NCAT) Industrial Relations Commission of New South Wales Supreme Court of New South Wales Personal Injury Commission
Victoria	Children's Court of Victoria Coroners Court of Victoria County Court of Victoria Magistrates' Court of Victoria Supreme Court of Victoria Victorian Civil and Administrative Tribunal (VCAT) Victims of Crime Assistance Tribunal (VOCAT)
Queensland	Queensland Human Rights Commission Children's Court of Queensland Queensland Civil and Administrative Tribunal (QCAT) Coroners Court of Queensland Crime & Corruption Commission Queensland Industrial Relations Commission Mental Health Court Murri Court Planning and Environment Court Queensland Drug and Alcohol Court Residential Tenancies Authority
Western Australia	Children's Court of Western Australia Coroner's Court of Western Australia District Court of Western Australia Industrial Magistrates Court



	Magistrates Court of Western Australia Supreme Court of Western Australia The Western Australian Industrial Relations Commission State Administrative Tribunal of Western Australia
Northern Territory	Northern Territory Local Court Supreme Court of the Northern Territory Northern Territory Civil and Administrative Tribunal (NTCAT)
Australian Capital Territory	ACT Civil and Administrative Tribunal (ACAT) ACT Magistrates Court ACT Supreme Court
Tasmania	The Supreme Court of Tasmania Magistrates Court of Tasmania Tribunals Tasmanian Civil & Administrative Tribunal (TASCAT)
South Australia	Supreme Court of South Australia District Court of South Australia Adelaide Magistrates Court Environment, Resources and Development Court Youth Court of South Australia Warden's Court Coroners Court South Australia Civil and Administrative Tribunal (SACAT) South Australian Employment Tribunal Independent Commissioner against Corruption South Australia



More information

- [New South Wales Subpoena Survival Guide, developed by Women's Legal Service NSW and Legal Aid NSW](#)
The guide has a focus on the Sexual Assault Communications Privilege but it also covers other protections relevant to subpoenas such as challenging the validity of subpoenas and tips on using the confidential professional relationship privilege.
- [County Court of Victoria Information on Subpoenas](#)
For FAQs, checklists and template subpoena documents. This information only relates to the County Court of Victoria.